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No. 93-1058

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOSEPH M. BENNETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in denying petitioner's motion to withdraw his guilty plea.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 48-51, is unpublished, but the decision is noted at 999 F.2d 548 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1993. A petition for rehearing was denied on August 12, 1993. Pet. App. 57. The petition for a writ of certiorari was filed on November 15, 1993, and therefore is out of time under Rule 13 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Colorado, petitioner was convicted on one count of conspiring to commit kidnapping, in violation of 18 U.S.C. 371 and 1201(a). He was sentenced to five years' probation, subject to the condition that he stay away from his victim and her family, and he was ordered to perform 100 hours of community service. The court of appeals affirmed. Pet. App. 48-51; Gov't C.A. App. Tab H.

1. In November of 1989, petitioner kidnapped Nicole Schoenekase, a two-and-one-half year old girl, and transported her to Illinois from her home in Denver, Colorado. Petitioner was indicted for kidnapping the child and aiding and abetting that crime, in violation of 18 U.S.C. 1201(a). Petitioner's petit jury was unable to reach a verdict, and the court declared a mistrial. A new trial date was set. On the day that the new trial was scheduled to begin, petitioner indicated that he wanted to enter into a plea agreement with the government. See Mar. 2, 1992, Tr. 2, 13-14 (Gov't C.A. App. Tab C); Gov't C.A. Br. 1.

2. At a change of plea hearing held on March 2, 1992, the court allowed petitioner to plead guilty pursuant to an oral plea agreement. Petitioner agreed to plead guilty to a one-count information charging him with conspiring to kidnap Nicole Schoenekase, and the government agreed to dismiss the original indictment and recommend a downward departure from the Sentencing Guidelines sentencing range to a sentence of probation. The government also agreed not to file further charges against petitioner stemming from the kidnapping incident and not to subpoena him before a grand jury that

was investigating his co-conspirators. Mar. 2, 1992, Tr. 3-5.

Petitioner's attorney explained to the court that petitioner was concerned that the girl he had kidnapped had been abused by her mother and stepfather, Debra and Richard Dodson (Mar. 2, 1992, Tr. 6):

> The only other thing that I should inform the Court is that I personally advised [petitioner] that I would assist him in investigating any matters relative to possible child abuse concerning the minor child, Nicole Schoenekase, in the state of Utah and would also urge the State of Illinois to exercise their jurisdiction in at least bringing the minor child back to the State of Illinois.

Petitioner's attorney also explained to the court that the prosecutor had agreed to assist in the investigation of the alleged abuse against the girl (*ibid.*):

> [The prosecutor] has graciously indicated that he would assist in an investigation here, if we supplied him the names of any witnesses that [petitioner] feels need to be interviewed. In that regard, he's agreed he would personally do that, and he would present a package to my office that we could send out to Utah and Illinois, given the historical situation in this case; specifically, the evidence of child abuse that they need to take a look at.

Petitioner also told the court (*id.* at 9) that "[m]y only statement would be that I entered into the [plea] agreement specifically with the idea that [the prosecutor]

would assist * * * in helping with Nicole's investigation."[1]

The prosecutor explained his understanding of that part of the plea agreement (Mar. 2, 1992, Tr. 9-10):

> [Petitioner], according to [petitioner's attorney], is very interested that we produce information concerning this case to [petitioner's attorney]. If we have not already, we will do that. If there are witnesses that need to be talked to, I've told him if [petitioner's attorney] can't do it, I'll be happy to do it personally. In other words, there will be a—there will continue to be a free flow of information between the Government and [petitioner's attorney]. And if he has some special requests that they want me to interview someone, I'll be happy to do it. If they want a packet put together showing what is available in this case, we'll do that, too.

The district court noted that "[i]t's a little unusual for a United States Attorney to get mixed up in a potential or alleged child abuse case, because this is usually handled by the local authorities." *Id.* at 10. In response, the prosecutor stated, "I understand; and I can't substitute my judgment for that of the State of Illinois, and I do not intend to do so. * * * But if there is anything I can do to facilitate an investigation, talking to folks, I'll be happy to cooperate and do that." *Ibid.*

The court then arraigned petitioner on the information charging him with conspiracy and advised him of his rights pursuant to Fed. R. Crim. P. 11. After consulting

[1] Petitioner initially stated his understanding that the Federal Bureau of Investigation would assist in the investigation, but after being corrected by his attorney, he retracted the statement. Mar. 2, 1992, Tr. 9.

further with his attorney, petitioner waived those rights and pleaded guilty to the information. The court deferred sentencing pending the preparation of a presentence report. Mar. 2, 1992, Tr. 12-24.

3. Pursuant to the plea agreement, the prosecutor sent a package of materials to the Department of Children and Family Services in Illinois.[2] The package included copies of the testimony presented at petitioner's first trial by several of the government's witnesses and all of petitioner's trial witnesses, a report from the Utah State Department of Human Services, and a report from Laurie Brody, a community service nurse who had visited Nicole Schoenekase's home on several occasions in the fall of 1989. Gov't Resp. to Def.'s Mot. To Withdraw Plea 1-2 & Exh. A (Gov't C.A. App. Tab E); see Gov't C.A. Br. 3.

On May 6, 1992, petitioner filed a motion to withdraw his guilty plea on the ground that the government had violated the plea agreement. The motion did not recite or allege any specific facts in support of that allegation, beyond the conclusory statement that "according to [petitioner], the government has interfered and attempted to dissuade local authorities from filing any child abuse charges against Rick Dodson [(Nicole Schoenekase's stepfather)]." Mot. To Withdraw Plea 2 (Gov't C.A. App. Tab D). In a written response to peti-

[2] The government's brief in the court of appeals states (at 3) that the materials were sent on May 5, 1992. That statement may be incorrect. The transmittal letter accompanying the materials bore a date of March 5, 1992. Gov't Resp. to Def.'s Mot. To Withdraw Plea Exh. A (Gov't C.A. App. Tab E) (photocopy of letter); see also May 18, 1992, Tr. 14 (Gov't C.A. App. Tab G) (statement of district court that materials were sent on March 5, 1992); Gov't C.A. Br. 3 (statement that materials were sent "three days after the change of plea hearing").

tioner's motion, the government informed the court that the Denver Police Department had investigated the alleged abuse against Nicole, and that the Denver District Attorney's Office had declined to file any charges. The government affirmed that "[t]he decision not to file state criminal charges was an independent decision made by a sovereign apart from the United States Government." Gov't Resp. to Def.'s Mot. To Withdraw Plea 1-2 & Exh. A. The government also demonstrated that it had provided materials to the appropriate child welfare authorities. *Ibid.* On May 13, 1992, the district court denied petitioner's motion without a hearing. Gov't C.A. App. Tab F; see Gov't C.A. Br. 3.

On May 18, 1992, at the sentencing hearing, petitioner orally renewed his motion to withdraw his guilty plea. He again alleged that the government had engaged in a "cover-up" of the child abuse against Nicole Schoenekase. In support of that allegation, petitioner sought to offer the testimony of Ellen Carver, a woman who "first became aware of the situation by simply reading about it in the newspaper," and whose only interest and involvement in the case was that of "an ordinary citizen." Petitioner stated that Carver would testify that she had telephoned the prosecutor, and that he had stated that he did not believe that the child was being abused; Carver also apparently spoke to an FBI agent who similarly stated his opinion that Nicole was not being abused. May 18, 1992, Tr. 3-5 (Gov't C.A. App. Tab G).

The district court denied petitioner's motion without hearing from Carver, explaining (May 18, 1992, Tr. 13-14):

> From what I can see in this case, the Government indeed has sent material to the State of Illinois, and there has been what looks to me on paper to be full

> cooperation with the State of Illinois as of March 5, 1992. There is also in the file correspondence to [the prosecutor] from Utah, where apparently the Dodson family lived, indicating that there was a thorough investigation by the Utah authorities, including letters from the Head Start teacher, which I think is very interesting, as well as Child Protective Services. And although apparently they didn't like Mr. Dodson very much, they still felt that there was no evidence of any problem.
>
> Now, that's about all that can be done. * * *
>
> So I see no basis and no changes since the time of the plea and no reason to allow him to withdraw his plea of guilty.

The court sentenced petitioner to five years' probation and ordered him to perform 100 hours of community service. As a condition of the probation, the court ordered petitioner to have no contact with Nicole or any member of the Dodson family. May 18, 1992, Tr. 36-38.

4. The court of appeals affirmed in an unpublished opinion. Pet. App. 48-51. The court rejected petitioner's claim that the government had violated the terms of the plea agreement and therefore affirmed the district court's denial of petitioner's motion to withdraw his guilty plea. The court explained (*id.* at 50):

> The record establishes that the government complied with the relevant terms of the plea agreement by sending several documents including transcripts and investigative reports, to the appropriate state authorities which have jurisdiction to investigate allegations of child abuse. The government's alleged statements to a disinterested third party do not evi-

dence interference with the states [*sic*] investigation of child abuse, nor do they undermine the cooperation and assistance the government provided pursuant to the plea agreement.

ARGUMENT

Petitioner renews his claim (Pet. 25-46) that the district court erred in denying his motion to withdraw his guilty plea. He contends that the government violated the terms of the plea agreement by obstructing state investigations into the alleged abuse against Nicole Schoenekase. As the court of appeals determined, that claim is without merit.

In *Santobello* v. *New York*, 404 U.S. 257, 262 (1971), this Court stated "that when a plea rests in any significant degree on a promise or agreement of the prosecutor * * * such promise must be fulfilled." If the government violates a plea agreement, the defendant is entitled to relief, which may include the right to withdraw his plea. *Id.* at 262-263; see also Fed. R. Crim. P. 32(d) (district court "may permit withdrawal of the plea [prior to sentencing] upon a showing by the defendant of any fair and just reason"). In this case, the government complied fully with the terms of the plea agreement. As promised, the government moved to dismiss the indictment, did not bring any further charges against petitioner, and recommended a sentence of probation. The government also sent several documents, including trial transcripts and investigative reports, to child welfare authorities, all in accordance with the statements made at the change of plea hearing.

To the extent petitioner supports his claim by reference to the record, he relies almost entirely on conversations that the prosecutor and an FBI agent had with

Ellen Carver. See Pet. 27-28, 31-33, 38-39. As the district court concluded, however, the conversations with Carver did not violate the plea agreement in this case. Indeed, as petitioner concedes (Pet. 32), the plea agreement imposed "no obligation" on the government to discuss the case with Carver. Furthermore, petitioner has not suggested that the conversations included any attempt to obstruct investigations into the alleged abuse. In sum, petitioner has not alleged any facts that would support his claim that federal authorities violated the plea agreement. Accordingly, the lower courts did not err in declining to allow him to withdraw his plea.

Finally, contrary to petitioner's assertion (Pet. 41-44), the district court was not obligated to hold a hearing on his motion to withdraw his guilty plea, for the simple reason that the motion did not include any "specific factual allegations" (*Blackledge* v. *Allison*, 431 U.S. 63, 76 (1977)) that would establish a basis for allowing him to withdraw his plea. In any event, the court effectively gave petitioner an oral hearing when it permitted him to renew the motion at the sentencing hearing, where petitioner's attorney and the court discussed the question at length. See May 18, 1992, Tr. 3-14. The only evidence petitioner sought to offer at that hearing was the testimony of Ellen Carver. Because petitioner's proffer regarding her testimony did not offer any support for petitioner's contention that the government had violated the plea agreement, the district court properly concluded that Carver's testimony would be irrelevant.[3]

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[3] As petitioner notes (Pet. 27-29), the unpublished opinion of the court of appeals includes two factual errors. First, the court erroneously stated (Pet. App. 49)—apparently in reliance on an incorrect statement at page 3 of the government's brief—that petitioner moved to withdraw his guilty plea four days after entering

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the plea. In fact, as petitioner points out (Pet. 27-28), he actually moved to withdraw his plea in May of 1992, two months after he entered the plea. Second, the court erred in stating (Pet. App. 49) that the district court denied petitioner's motion to withdraw after holding a hearing. In fact, as petitioner points out (Pet. 28), the court instead denied the motion without a hearing. Of course, as outlined above, the court subsequently did allow petitioner to reargue the point at the sentencing hearing.

Petitioner does not, however, offer any substantial basis for supposing that the court of appeals' misapprehension of those facts affected its decision, which rested on its conclusion that the government complied with the plea agreement. Pet. App. 50. Neither the timing of petitioner's motion to withdraw his guilty plea nor the district court's decision to deny the motion without a hearing is relevant to that conclusion.